Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1996

WALTER T. SILMON,

Petitioner,

vs.

FIRST BANCORP OF LOUISIANA, INC., J. HERBERT BOYDSTUN, ROBERT P. MCLEOD, DELMA CARTER, R. L. DAVIS, JR., MALCOLM E. MADDOX, AND PATRICK L. SPENCER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES A. ROUNTREE
HUDSON, POTTS & BERNSTEIN, L.L.P.
130 Desiard Street, Tenth Floor
P. O. Box 3008
Monroe, Louisiana 71210-3008
(318) 388-4400

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

May officers and directors of a closely-held corporation who initiate a securities transaction engage in deceptive practices so long as they are not then engaged in negotiations for a sale or merger of the corporation?

PARTIES TO THE PROCEEDING

The parties to the proceeding are those in the caption and Hibernia Corporation. Walter T. Silmon filed suit against First Bancorp of Louisiana, Inc. Not long after the suit was filed, First Bancorp of Louisiana, Inc. was acquired by Hibernia Corporation. J. Herbert Boydstun, Robert P. McLeod, Delma Carter, R.L. Davis, Jr., Malcolm E. Maddox, and Patrick L. Spencer were officers and/or directors of First Bancorp of Louisiana, Inc. or its subsidiary, First National Bank of West Monroe.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinions and orders involved in this case are set forth in Appendix A to the petition. The decisions of the courts below are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1996. Rehearing was denied on October 8, 1996. This court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

15 U.S.C. §78j
Manipulative and deceptive devices

Rule 10b-5 (17 C.F.R. §240.10b-5)
Employment of manipulative and deceptive devices

15 U.S.C. §78t
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18 U.S.C. §1962
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18 U.S.C. §1341
Frauds and swindles

18 U.S.C. §1343
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18 U.S.C. §1344
Bank fraud

18 U.S.C. §1346
Definition of "scheme or artifice to defraud"

LA R.S. 14:66
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STATEMENT OF THE CASE

Factual Background.

Until the spring of 1990, Walter Silmon was a director of First Bancorp of Louisiana, Inc. (Bancorp), a small bank holding company formed in 1987 to acquire First National Bank of West Monroe, Louisiana (FNB). Plaintiff lacks formal education, but through hard work and thrift, he succeeded in life and business. Plaintiff bought $1,000,000 of subordinated convertible debentures so that the holding company could get a loan to buy the bank.

Herb Boydstun was the CEO of the holding company and subsidiary bank. Believing that he had been cheated when Bancorp was formed, plaintiff quarreled with Boydstun before his resignation as a director. Plaintiff sold his Bancorp stock, but retained the convertible debentures.

A difficult period for banks in Louisiana came to an end in 1990. Earnings at Bancorp began to improve substantially in the second half of that year. For the first time in its history (and its subsidiary's), cash dividends were declared at the end of 1990. Since plaintiff no longer owned Bancorp common stock, he was not told of this development.

Earnings growth continued to accelerate in 1991 and 1992. At the end of 1991, Boydstun sought, for himself and undisclosed others, to purchase plaintiff's debentures. Though he had been willing to sell the debentures in 1990, plaintiff declined because he was earning 10% interest, a rate that made the debentures a good investment, particularly for an older man like Mr. Silmon.

Boydstun was undeterred by plaintiff's refusal to sell the securities. Within weeks after his unsuccessful effort, on February 3, 1992, Boydstun wrote to the Federal Reserve Bank in Dallas stating "it is the intention of FBL (Bancorp) to pay some $300,000 to $400,000 on the debentures from our cash holdings and reissue the debentures on substantially the same terms and conditions to interested parties who will include existing directors of FBL and FNB, officers of FNB, and directors emeritus."

On July 30, 1992, Boydstun sent plaintiff a certified letter advising that plaintiff's debentures had been called for retirement as of August 31, 1992. The notice triggered a ten-day period within which plaintiff had an option to convert some or all of the debentures to common stock. The ten-day period expired while plaintiff agonized over his investment decision.

Plaintiff surrendered the debentures on August 31, 1992. On that same date, Bancorp issued $850,000 of convertible debentures to its insiders. The new debentures had the identical maturity date and interest rate, but a slightly higher conversion price.

Defendants concealed from plaintiff their plan to reissue the debentures to corporate insiders. They did not inform plaintiff that Bancorp had begun paying cash dividends, nor did they advise plaintiff how earnings had improved since the first half of 1990.

Boydstun controlled who got stock in Bancorp. Before 1991, Boydstun attempted to match buyers and sellers. Between 1991 and the date Bancorp was merged into Hibernia Corporation in mid-1994, there were no independent party purchases of Bancorp stock. The only buyers were Bancorp and corporate insiders. The price of stock was not affected by improved earnings.

Bancorp had an employee stock ownership plan. To comply with ERISA, a third party valuation of ESOP stock was made each year as of June 30. Just before the valuation date in 1992, defendants caused letters to be written to former bank employees that misrepresented the value of Bancorp stock allocated to their ESOP accounts. Former employees were not informed that stock would be revalued as of June 30, 1992, or that the 1991 appraisal, the basis of the price offered, had been reduced at the suggestion of CFO Pat Spencer.

Boydstun began negotiations for the sale of Bancorp in May of 1993 after receiving an offer for more than a hundred dollars per share. Despite ongoing negotiations for the sale of the corporation, defendants pulled the

same trick in 1993. At least one employee who resigned at the end of 1992 was told in June 1993 that (1) the value of Bancorp stock allocated to his ESOP account was $34.66 per share (the June 30, 1992 appraisal), and (2) he must act within a matter of days to get the value of his stock.

Procedural History.

Not long after the announcement of the sale of Bancorp, plaintiff heard rumors of the good fortune experienced by Boydstun and his friends. It sounded as if Boydstun and others had actually purchased plaintiff's debentures contrary to the redemption notice that said the debentures were to be retired. This suit was filed after plaintiff confirmed his suspicions. The original complaint sought damages for fraud that tainted the investment decision defendants compelled plaintiff to make. Plaintiff then learned that he was not the only victim of fraud in connection with the sale of securities. Perceiving a systematic effort to increase the insiders' percentage interest in Bancorp and to exclude disfavored persons from sharing the benefit of the sale of Bancorp, plaintiff amended the complaint to seek treble damages under 18 U.S.C. §1961 et seq.

Plaintiff's RICO complaint was dismissed for failure to state a claim for which relief can be granted. The complaint for damages for securities fraud was dismissed on summary judgment. Plaintiff appealed, but the decisions were affirmed without opinion.

REASONS FOR GRANTING THE WRIT

By summarily affirming without comment, the court of appeals sanctioned such a departure from the accepted and usual course of judicial proceeding as to call for the exercise of this Court's power of supervision.

In a cover story published on December 14, 1994, *Business Week* addressed the shift in insider trading from Wall Street to Main Street.[1] The *American Banker* re-emphasized the point in an article published on February 26, 1996.[2] Bankers were warned of the sophistication of the exchanges and how insider trading may be detected and prosecuted by the Securities Exchange Commission.

Many small banks and bank holding companies, including Bancorp, that have been acquired in recent years are too small for their shares to trade on an exchange. A fraudulent scheme to enrich insiders at the expense of other owners of securities, even if practiced over a long period of time, is unlikely to attract the attention of any regulatory agency. Private actions such as this one are important for the enforcement of securities laws.

> Congress recognized, in adopting the federal securities laws, that private actions for damages could play an important role in assuring compliance. . . . If one were to compare in quantitative terms actions based upon the federal securities

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[1] Barrett, et al. "Insider Trading." *Business Week*, no. 3403, Dec. 12, 1994.

[2] Rhoades, "Insider Trading Goes from Wall St. to Main St." *American Banker*, vol. 161, no. 36, Feb. 26, 1996.

> laws initiated by private parties with those initiated by the Commission, it would become apparent that the private action is an effective and indispensable supplement to the "policing" of the federal securities laws.

Blumenthal, *Securities Law Handbook*, §14.05, p. 518 (1995).

Referring to the purpose of the Securities Exchange Act, this Court said in *Randall v. Loftsgaarden*, 478 U.S. 647, 664, 92 L.Ed.2d 525, 542, 106 S.Ct. 3143 (1986), "Congress intended to deter fraud and manipulative practices in the securities markets, and to ensure full disclosure of information material to investment decisions." In a much-quoted passage, the Court said earlier that the purpose of the securities laws was to "substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry." *S.E.C. v. Capital Gains Research Bureau*, 375 U.S. 180, 186, 11 L.Ed.2d 237, 243, 84 S.Ct. 275 (1973).

The district court and the court of appeals imposed an arbitrary condition on their enforcement of §10(b) and Rule 10b-5: misrepresentations or omissions of material fact are actionable only if the company is engaged in negotiations for its sale. To be more precise, facts relating to a securities transaction are material only during negotiations for the sale of a company. Summary judgment for defendants was also based on a botched due diligence analysis.

Materiality.

This Court defined materiality in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 48 L.Ed.2d 757, 766, 96 S.Ct. 2126 (1976), a definition that was adopted in the Rule 10b-5 context by *Basic Incorporated v. Levinson*, 485 U.S. 224, 232, 99 L.Ed.2d 194, 208-209, 108 S.Ct. 978, 989 (1988).

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. This standard . . . does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote . . . (but that) the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder.

Defendants forced plaintiff to make an investment decision. He had but ten days within which to decide whether to convert debentures to common stock or accept repayment of the debt evidenced by the securities. At a minimum, defendants should have told plaintiff of the plan to reissue debentures to the insiders. They should have told plaintiff that earnings had improved dramatically since he resigned in 1990,[3] and they should have told him that Bancorp had begun paying cash dividends. These omissions were complemented by misrepresentation. In the redemption letter of July 1992, Boydstun told plaintiff that the debentures would be retired.

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[3] FNB earned $836,000 in 1990, $1,225,000 in 1991, and in the first six months of 1992, it earned $1,059,000.

Ignoring the definition of materiality, Judge Stagg concluded that "[a]s a matter of law, neither the alleged misrepresentation nor the alleged omissions are material 'facts.' " (Appendix page A-20). As this Court said in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450, 48 L.Ed.2d 757, 766, 96 S.Ct. 2126 (1976), however, the determination of materiality

> requires delicate assessments of the inferences a "reasonable shareholder" would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact.

The district court reached its conclusion that the facts alleged by Silmon were immaterial as a matter of law by setting up a conflict that does not exist between Silmon's case and *Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988). In a classic non sequitur, Judge Stagg wrote (Appendix page A-21):

> Silmon attempts to distinguish *Ward*, however, by pointing out that there is evidence of manipulation and deception by Bancorp. And, after all, *Ward* and *Vaughn [v. Teledyne, Inc.*, 628 F.2d 1214 (9th Cir. 1980)] do state that "impure deeds or omissions" or misleading or fraudulent practices which enable a defendant to implement a plan are actionable. The obvious flaw in this argument is still that there is no evidence of a plan to *implement* (emphasis by the court). That is, it seems that the rule in *Ward* and *Vaughn* is that a defendant's plan to gain more control over a corporation by acquisition of stock is not

> actionable; the exception is if, in implementing that plan, deceptive practices are employed. **Thus, if there is no evidence of such a plan – that is, as *Ward* requires, commencement of negotiations – the entire claim must fail.** . . . Thus, because there is no evidence that negotiations had commenced when the debentures were redeemed, his 10b-5 claims must be dismissed. (emphasis supplied)

The mere fact that Bancorp planned to reissue debentures to be acquired by its insiders is a material fact. It is almost material as a matter of law. Insider trading is a required disclosure for reporting companies. Section 16(a) of the Exchange Act, 15 U.S.C. §78p(a). The summary judgment record contained testimony from defendants' expert that "[s]ome people think that insider trading in a stock is a precursor for the outlook for the future, for the performance outlook for the future." Referring to the contrast between the statement in the redemption letter that the debentures would be retired and defendants' actual conduct, plaintiff's expert testified:

> [Y]ou would then ask yourself the question why are they doing so, because that is entirely different than retiring the debentures. . . . Now you find out the insiders (who) were trying to buy your debentures back, are buying debentures themselves, in other words, they're going to pay for the reissued debentures, and that would lead a prudent individual to wonder why they would do so.

Had plaintiff known of the plan to reissue debentures, he would have converted debt to equity. If plaintiff had known about improved earnings and dividends, it would have affected his investment decision.

Due Diligence.

The other basis for summary judgment was the perception that plaintiff failed to exercise due diligence. As the due diligence requirement is commonly understood, recovery is precluded if defendant's fraud is readily apparent.

> Successful invocation of the defense will likely be a rare event, essentially limited to a small breed of stubborn plaintiffs who knew, or were severely reckless in not knowing, that they acquired or sold securities when the defendant was committing fraud.

Loss and Seligman, *Fundamentals of Securities Regulation*, p. 1131 (3d ed. 1995).

As applied in this case, the due diligence test was altogether different. Plaintiff was required to inform himself of the facts defendants were under a duty to disclose. Without notice of fraud, however, there was no reason for plaintiff to suspect the half truth in the statement that his debentures were to be "retired." Plaintiff was entitled to assume that the conditions that prevailed in early 1990 were not materially different in 1992. There were changes, however, and because the changes were significant, defendants should have disclosed improved earnings and the commencement of cash dividend payments.

The Fraud Practiced against Plaintiff was Part of a Pattern.

The summary judgment record contained evidence of a reduction in the 1991 "appraisal" of ESOP stock in response to a request from Pat Spencer, the bank's chief

financial officer. Despite the imminent revaluation scheduled for June 30, defendants caused letters to be sent by United States mail in May 1992 to encourage former employees to authorize the liquidation of Bancorp stock allocated to their ESOP accounts based on the suppressed 1991 valuation. The effort succeeded. In May and June of 1992, former employees authorized the sale of their stock to Bancorp for $26.61 per share. As of June 30, 1992, it was valued at $34.66 per share.

In June of 1993, after Boydstun received an offer of more than $100 a share for all of Bancorp's stock, a recently resigned employee was told by letter that his stock had a value of $34.66 per share, and that he could withdraw the value of the stock without waiting five years if he authorized the sale within a matter of days. The trick worked again.[4]

In dismissing plaintiff's RICO claim under Fed.R.Civ.P. 12(b)(6), the courts below ignored this Court's mandate to accept plaintiff's factual allegations as true and to draw all reasonable inferences in plaintiff's favor. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249, 106 L.Ed.2d 195, 213-214, 109 S.Ct. 2893, 2905 (1989); *Conley v. Gibson*, 355 U.S. 41, 46-47, 2 L.Ed. 80, 84, 78 S.Ct. 99, 102 (1957). Instead, the magistrate judge wrote at Appendix page A-41:

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[4] Plaintiff was not permitted to conduct discovery of facts relating to his RICO claim. In an ironic twist, the magistrate judge stayed discovery and then recommended dismissal saying the plaintiff had failed to allege fraud with sufficient particularity. Plaintiff does not know how many former employees were affected by these moves in 1992 and 1993.

> Plaintiff does not allege, however, any facts in support of his conclusions that the value of the stock actually was higher than the purchase price at the time of these transactions and that the value stated in the appraisal was inaccurate; nor does he allege any facts in support of his conclusion that the defendants had knowledge that the actual value of stock was higher than the amount paid.

That Bancorp stock was, to defendants' knowledge, worth more than $26.61 per share in May and June of 1992 was an allegation of fact. Plaintiff also alleged that (1) the "appraisal" used to establish value was a year old, (2) defendant Spencer persuaded Austin Associates (the third party appraiser) to lower the value of the stock, (3) Bancorp stock was valued at $34.66 as of June 30, 1992, (4) earnings between June 30, 1991 and May of 1992 had improved substantially, and (5) former employees were urged to respond before the new valuation date.

The magistrate judge opined that a charge of bank fraud must be accompanied by proof that the transaction resulted in a loss to the bank. Appendix page A-39. There is, however, no such requirement in 18 U.S.C. §1344.

The seething contempt for plaintiff's RICO claims bubbled to the surface of the magistrate judge's report and recommendation on pages 17 and 18 when he referred to an extortion predicate as "the outer limits of plaintiff's attempt to characterize virtually any mailing or use of the telephone by defendants that bore even the slightest relationship to this controversy as an act of mail

fraud or wire fraud." Something other than plaintiff's pleadings influenced the magistrate judge's recommendation to dismiss plaintiff's RICO claims.

It is impossible to escape the conclusion that the reasons expressed by the magistrate judge and the district judge followed rather than led to the decisions to dismiss plaintiff's suit.

CONCLUSION

The consolidation taking place in the banking industry proceeds. Although the decision in this case is unreported, the existence of the case was well known in banking circles in Louisiana. Before it was dismissed, there is no doubt that the level of disclosure had improved greatly. Bank insiders continue to profit handsomely, but at least they have been disclosing their benefits to shareholders. To some extent, concern over the glare of litigation will continue as a beneficial influence, but a message has been sent to those who would take advantage of others. Fraud will be permitted unless there are ongoing discussions for the sale of the bank, and one cannot expect careful review from the court of appeals no matter how far the district court departs from the accepted and usual course of judicial proceedings.

James A. Rountree
Hudson, Potts & Bernstein, L.L.P.
130 DeSiard Street, Tenth Floor
P. O. Box 3008
Monroe, Louisiana 71210-3008
(318) 388-4400

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-31194
(Summary Calendar)

WALTER T. SILMON,

Plaintiff-Appellant,

versus

J. HERBERT BOYDSTUN; ROBERT P. MCCLEOD; R.L. DAVIS, JR.; PATRICK L. SPENCER; MALCOLM E. MADDOX; HIBERNIA CORP., also known as Bancorp, As Successor to First Bancorp of Louisiana, Inc.,

Defendants-Appellees.

Appeal from United States District Court
for the Western District of Louisiana
(CA-94-1031)

(Filed Aug. 26, 1996)

Before JOLLY, JONES and STEWART, Circuit Judges.

PER CURIAM:*

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Walter T. Silmon appeals to this court the district court's judgment granting summary judgment regarding his securities fraud claims and the order dismissing his RICO claims. Having reviewed the pertinent parts of the record and briefs of counsel and finding no actionable claims, on the basis of the facts as found, authorities cited, and scholarly analysis of the district court entered October 31, 1995, the judgment appealed is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-31194

WALTER T SILMON

Plaintiff - Appellant

v.

J HERBERT BOYDSTUN; ROBERT P MCCLEOD; R L DAVIS, JR; PATRICK L SPENCER; MALCOLM E MADDOX; HIBERNIA CORP, also known as Bancorp, As Successor to First Bancorp of Louisiana, Inc

Defendants - Appellees

Appeal from the United States District Court for the Western District of Louisiana, Monroe

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion ___, 5 Cir., ___, ___ F.3d ___)

(Filed Oct. 8, 1996)

Before JOLLY, JONES and STEWART, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on

Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carl E. Stewart
United States Circuit Judge

Judge Dennis did not participate in the consideration of the suggestion for rehearing en banc.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

WALTER T. SILMON

versus

FIRST BANCORP OF LOUISIANA, INC., J. HERBERT BOYDSTUN, ROBERT P. McLEOD, DELMA CARTER, R. L. DAVIS JR., MALCOLM E. MADDOX and PATRICK L. SPENCER

CIVIL ACTION NO. 94-1031

JUDGE TOM STAGG

MEMORANDUM RULING

(Filed Nov. 16, 1995)

I. INTRODUCTION

Walter T. Silmon ("Silmon") brings this lawsuit alleging that the defendants (collectively referred to as "Bancorp") violated:

(1) §10(b) of the Securities Exchange Act and Rule 10b-5;

(2) §20A of the Securities Exchange Act;

(3) Louisiana Blue Sky Law; and

(4) Louisiana Civil Code article 1953.

Bancorp filed a motion for summary judgment requesting this court to dismiss all of Silmon's claims.

A brief note concerning the posture of this case is warranted. The pretrial conference was held on October 30, 1995; major rulings were made that narrowed the issues of this case. These rulings are reflected in the court's November 1, 1995, minute entry, but can easily be summarized as follows: Silmon's RICO claims were dismissed because, *inter alia*, they failed to meet the standards imposed by this court's "Standing RICO Order;" Silmon's intentional interference with contract claim under Louisiana law was dismissed by agreement of Silmon; Silmon's claims against certain trusts were dismissed because they were improperly joined; and various evidentiary rulings were made, while others were deferred.

The only dispositive motion that was deferred at the pretrial conference was the present motion for summary judgment filed by Bancorp. Over the past weeks, the court has read hundreds of pages of motions, briefs, affidavits, deposition excerpts, financial records, correspondence, and contracts, looking for Mr. Silmon's case against Bancorp and others. Not being satisfied with that effort, the court called for an evidentiary hearing pursuant to Rule 43 of the F.R.C.P.,[1] with presentation by the

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[1] F.R.C.P. 43(e) provides:

> When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

Although oral testimony on a summary judgment motion should be used sparingly and with great care, it is proper when such testimony would be of significant assistance and is

parties of oral testimony and argument properly circumscribed to address the most troublesome issues. This hearing, while unorthodox, was extremely helpful. It produced a few live witnesses and Mr. Silmon himself, together with additional exhibits and oral argument. Having reviewed the hearing transcript,[2] the summary judgment materials, and the relevant cases, the court is now of the opinion that no claims alleged by Silmon are actionable. For the reasons set forth below, Bancorp's motion is **GRANTED** and Silmon's claims are **DISMISSED WITH PREJUDICE.**

II. FACTS[3]

In 1978, Silmon first purchased shares of the common stock of First National Bank of West Monroe ("FNB"). He was appointed to FNB's Board of Directors in 1981. He continued to serve on the Board until October 1987. In

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appropriately circumscribed in scope. *See* 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2723 (1983). Thus, the court issued its November 9, 1995, minute entry to clarify the precise issues to be addressed at the summary judgment hearing.

[2] There are references to excerpts from transcripts in this Memorandum Ruling. One may wonder how the court was able to obtain such speedy turn-around time on the transcript. Technology is the answer. We are fortunate enough to have real-time court reporting services combined with an intelligent software program called "Livenote" that allows instant retrieval of testimony. It proved its worth in this case with time being of the essence.

[3] Most of the facts described in this section are taken directly from the stipulated facts contained in the Pretrial Order filed by the parties.

September 1988, he was reelected to FNB's Board. He served on this Board until May 1990, at which time he resigned.

In late 1986, Silmon and J. Herbert Boydstun ("Boydstun"), who was then the Chief Executive Officer and a director of FNB, agreed to collaborate in the formation of a holding company for FNB. Bancorp was formed, and, ultimately, owned much of the stock of FNB as its holding company. For Bancorp to purchase the FNB common stock, however, it had to receive a loan from AmSouth Bank in the original principal amount of $6,098,168. As a condition of this loan, AmSouth required the provision of $1 million of capital in Bancorp, either in the form of additional equity or subordinated debentures.

Silmon agreed to purchase ten convertible subordinated debentures, each in the principal amount of $100,000. Among other terms and conditions, the Silmon debentures provided for payment of interest at 10 per cent per annum and payment of all principal in the year 2002. Silmon was granted the right to convert the principal amount of the debentures to Bancorp stock at the conversion price of $23.75 per share. The debentures could be redeemed by Bancorp at any time. In the event of redemption, Bancorp would be required to give written notice to Silmon. Silmon would have ten days from the date of notice to elect whether to convert the debentures to common stock of Bancorp or receive a cash payment of $1 million plus accrued interest. It should be noted, also, that Silmon served on Bancorp's Board of Directors until May 1990.

In May 1990, because of a dispute between Silmon and Boydstun, Silmon exchanged all of his Bancorp common stock for a promissory note of Pete Caldwell Drilling Co., Inc.[4] Also, he resigned from FNB and Bancorp's Boards of Directors that same month. While he was on FNB and Bancorp's Boards of Directors, as well as their loan and executive committees, Silmon attended both board meetings, and both committee meetings, on a monthly basis. As the exhibits offered by Bancorp at the summary judgment hearing indicate, discussions were held at these meetings regarding various items of financial information. Defendants' Summary Judgment Hearing Exhibit Nos. 2-5. Although Silmon says he received

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[4] The background of the conflict between Silmon and Boydstun is necessary to appreciate completely the genesis of the present feud. That is, the claims being litigated now did not occur in a vacuum – Silmon and Boydstun's relationship has a storied history. The summary judgment attachments are replete with disputes of a high order of magnitude; bad feeling were serious by 1988 and 1989. Especially illuminating are Exhibits 8 and 9 to defendants' Motion For Summary Judgment.

The former exhibit is a letter on November 9, 1988, by Silmon to Boydstun and Will Pratt; Silmon communicates in a forceful and pointed manner his protestations concerning the treatment he was receiving regarding such items as the banks refusal to name him Vice Chairman and pay him a larger salary. At one point Silmon suggests that if Boydstun and Pratt did not think well of him, "maybe you need to have me dis-associated from the bank."

The latter exhibit is a letter written on July 26, 1989, by Robert McLeod, a defendant in this case, to James Rountree, Silmon's counsel. It concerns the dispute between Silmon and the bank and Rountree's alleged threat of RICO claims being filed.

this financial information, he never reviewed it; rather, he relied on others to explain this information to him.[5]

After May 1990, the only interest Silmon had in FNB or Bancorp was the outstanding convertible debentures. On one or two occasions in late 1991 and/or early 1992, Boydstun approached Silmon with the request that Silmon sell his debentures. Silmon refused, stating he wanted to retain them longer. Nevertheless, Boydstun advised the Federal Reserve Bank in February 1992 that Silmon's debentures would be retired and that new debentures would be issued to officers of FNB and Bancorp. Similarly, he gave notice to Whitney Bank, the successor to AmSouth. So, the decision to issue new debentures to corporate insiders upon the redemption of the Silmon debentures was not known only to Bancorp.

On July 30, 1992, a letter of redemption was delivered to Silmon by certified mail. Boydstun claims he also hand-delivered this notice to Silmon, and told Silmon to contact him if he had any inquiries. Silmon denies any hand-delivery. Regardless of the manner of delivery, the letter provided, in its entirety:

> First Bancorp of Louisiana, Inc. (the "Company") hereby notifies you that it is calling pursuant to Section 1.3 of the convertible Subordinated Debenture Agreement dated August 28, 1987, between the Company and you (the "Debenture Agreement") for redemption of

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[5] Silmon contends that he is lacking in education and "figures are Greek to me." Nonetheless, the record shows he operated a successful wholesale operation and has accumulated considerable wealth.

all ten of the $100,000 in principal amount 10% subordinated debentures (the "Debentures") you own of record. The date of redemption has been set for August 31, 1992 (the "Redemption Date"). On the Redemption Date, you will be entitled to receive $100,000 per Debenture plus accrued and unpaid interest thereon per Debenture of $5,111.11 for total consideration of $105,111.11 per Debenture.

On the Redemption Date, the Company will deposit a total of $1,051,111.10 in full payment of all of your Debentures in an interest earning account at First National Bank of West Monroe (the "Bank"). In addition, the Company will *retire* the Debentures on its books and records. Upon delivery of the Debentures to the Company, the funds held in escrow at the Bank will be released to you.

Pursuant to Section 1.3 of the Debenture Agreement, you have 30 days from the date of this Notice of Redemption letter to convert all or a portion of your Debentures into common stock of the Company at the conversion price set forth in the Debenture Agreement. Please note, however, that you must give the Company written notice within 10 days from the date you receive this Notice of Redemption letter to notify the Company of your intent to convert all or a portion of your Debentures into common stock of the Company.

All notices should be sent to or *inquiries made* to Mr. J. Herbert Boydstun, President and Chief Executive Officer at (318) 329-0201.

Defendants' Summary Judgment Hearing Exhibit No. 1 (emphasis added). Thus, this letter was in accordance with the convertible subordinated debenture agreement.

Following his receipt of the notice of redemption, Silmon consulted with Don Walker, his certified public accountant; James Rountree, his attorney; and William Boles, chairman of the board of American Bank & Trust Company and a Monroe attorney. Importantly, however, he did not request anything from Bancorp or any of its directors, officers, or employees. Although Silmon testified at the summary judgment hearing that Walker advised him to convert the debentures into stock, apparently the 10-day time period was allowed to elapse without Silmon giving the required notice:

> Mr. Walker said, Walter, you have struggled, I've seen you over these years struggle and scratch and pay every nickel that you got on these debentures to get that debt paid. That's my trait, I don't like no debt. I like to pay what I owe. He said maybe you ought just to convert them. Well, I wrestled with that and went on and wrestled with it through the weeks and this and that and the other. First thing I knew, time done expired and I done lost my shot then, you see. Then I made no decision. That's really what I did.

Transcript of Summary Judgment Hearing, at 75 (November 14, 1995). To clarify whether Silmon was told by Walker to "convert" the debentures into stock or cash, the court entered into the following exchange with Silmon:

> THE COURT: What was Mr. Walker's advice to you?

THE WITNESS: Mr. Walker, he just told me, he said Walter the final decision is gonna have to be yours, he said, but you have worked hard and struggled to pay for these debentures and he said I might just advise you to maybe keep all or keep part of them and since you've done got them paid for now, you done gone through the hardships maybe just keep the stock because, you know.

THE COURT: This was at the time you had the redemption notice. What did he tell you to do with the redemption notice?

THE WITNESS: Redemption notice? He – he didn't tell me, sir. He didn't tell me what to do with it. He said that's gonna be your final decision.

THE COURT: He didn't say – I have a note here where you said maybe you ought to convert them.

THE WITNESS: Yes, that's right, that's right, he did say, he said you –.

THE COURT: What did he mean by that advice, convert them to cash or convert them to stock?

THE WITNESS: Stock, convert them to stock.

THE COURT: That's your recollection of his advice?

THE WITNESS: That's right, that's exactly what it was. He –

Transcript of Summary Judgment Hearing, at 84-85 (November 14, 1995).

Thus, with Silmon having failed to provide Bancorp with timely written notice that he wished to convert his debentures to Bancorp common stock, the debentures were paid off in cash. Silmon walked into the Bank early on August 31, 1992, and received his $1 million plus accrued interest.

On this same day, Bancorp issued $850,000 in new, shorter term debentures to various officers, directors, and trusts for their retirement accounts. See Pretrial Order, § D27. Also, these debentures had a higher redemption price than Silmon's debentures. These parties received, in differing individual amounts, the $850,000 in debentures convertible at $26.61 per share; on the other hand, Silmon's debentures were redeemed at the conversion price of $23.75 per share.

There is no evidence that on August 31, 1992, the date of redemption and issuance of the new debentures, Bancorp had any strategy in place to merge into or be acquired by another bank. At the summary judgment hearing, the court heard brief testimony from directors and officers of FNB and Bancorp (Boydstun, McLeod, Dave Norris, and Spencer). Boydstun stated that the first contact made regarding the sale of Bancorp was in May of 1993, when Boydstun met for lunch with Lee Griffin, the chief executive officer of Premier, and R. Neil Williams, the executive vice president and chief financial officer of Premier. *See* Defendants' Summary Judgment Hearing Exhibit No. 10. This was some eight months and a few days after the redemption of Silmon's debentures. In fact, Boydstun testified that Bancorp actually planned to begin to acquire banks – as opposed to being acquired by another bank – and to remain independent. The affidavit

of Griffin confirms this testimony. Defendants' Summary Judgment Hearing Exhibit No. 10. Indeed, McLeod, Norris, and Spencer all testified that they, too, were unaware of any plan to sell Bancorp until the May 5, 1993, meeting between Premier and Bancorp. Silmon has not contradicted this evidence in any fashion.

Some time in late 1993, word leaked to the newspaper in Monroe that Premier had been negotiating to acquire Bancorp. This information became known to Stephen Hansel, the president and chief executive officer of Hibernia, and he immediately contacted Bancorp, also. Negotiations moved quickly, and in only thirteen days Hibernia successfully concluded the acquisition of Bancorp in November 1993. Transcript of Summary Judgment Hearing, at 34 (November 14, 1995)(Testimony of Stephen Hansel). The merger agreement provided that Hibernia would acquire Bancorp for $151.50 per share, later escalated to $155.64 per share, a significant jump from Silmon's $23.75 per share only fourteen months earlier.

III. SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The court must "review the facts drawing all inferences most favorable to the party opposing the motion." *Reid v. State Farm Mut. Auto Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986).

The party seeking summary judgment has the initial responsibility of informing the court of the basis for its motion, and identifying those parts of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). The moving party need not produce evidence negating the existence of a material fact, but need only point out the absence of evidence supporting the nonmoving party's case. *Id.* at 325, 106 S. Ct. at 2554; *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1195 (5th Cir. 1986). If the moving party carries his initial burden, the burden then falls upon the nonmoving party to demonstrate the existence of a genuine issue of a material fact. This showing requires more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 1355-56 (1986). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Id.*; *see Boeing Company v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc). While the party opposing the motion may use proof filed by the movant to satisfy his burden, "only evidence – not argument, not facts in the complaint – will satisfy" the burden. *Solo Serve Corp. v. Westowne Assoc.*, 929 F.2d 160, 164 (5th Cir. 1991). "Unsworn pleadings, memoranda or the like are not, of course, competent summary judgment evidence." *Larry v. White*, 929 F.2d 206, 211 n. 12 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1946 (1993).

Where the moving party bears the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. *International Short Stop, Inc. v. Rally's,*

Inc., 939 F.2d 1257 (5th Cir. 1991), *cert. denied*, 502 U.S. 1059, 112 S. Ct. 936 (1992). The non-movant may defeat the motion by showing a genuine dispute of material fact or by showing that the moving party's evidence is so transparent that it may not persuade the reasonable fact-finder to return a verdict in favor of the moving party. *Id.*

IV. RULE 10b-5 CLAIM

A. General Legal Standard

In order to prove his claim under Rule 10b-5, Silmon must establish (1) a misrepresentation or omission (2) of material fact (3) made with scienter (4) on which Silmon relied (or exercised due diligence against) (5) that proximately caused his injury. *See Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994). The failure of Silmon to raise a genuine issue of material fact as to any one of these elements regarding any one of his claims will result in the dismissal of that claim. Indeed, Silmon has failed to show a genuine issue of material fact regarding (1) materiality and (2) due diligence.

1. Materiality

The Fifth Circuit has faced the materiality issue in a similar case, *Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988).[6] There, plaintiffs' stock was redeemed in a

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[6] Although the parties cited many other cases in support of their respective positions, the court finds *Ward* to be the controlling, dispositive decision.

series of transactions by the corporation, thereby increasing the defendants' ownership interest in the corporation from 20% to 86% over a four-year period. Ultimately the corporation was sold for two to three times the value it had when the plaintiffs' stock was redeemed. The plaintiffs alleged, after learning of the sale approximately three years after their stock had been redeemed, that the defendants had a calculated plan to acquire a large bloc of stock with the intent to sell the company for a windfall profit. An important allegation was, as it is in the present case, that the stock was actually worth much more than the price paid by the defendants. Following a jury trial in which the defendants were found liable, the Fifth Circuit reversed, holding that the trial judge had improperly instructed the jury regarding the 10b-5 claims.

The basis for the court's holding was that the plaintiffs were seeking to inquire into the defendants' personal motives in redeeming the plaintiffs' stock, which is simply not a material fact. In fact, it was stated that:

> [c]ase law clearly holds that a defendant's motive is not a material "fact."

Id. at 791. Jurisprudence was cited in support of this statement: *Biesenbach v. Gunther*, 588 F.2d 400 (3d Cir. 1978), where there was no need for directors to disclose that "the true purpose behind" their activities was to gain control of the corporation; *Coronet Ins. Co. v. Seyfarth*, 665 F.Supp. 1482 (D.Del. 1984), where it was held that the failure of directors to disclose their plan to entrench themselves in office by means of a tender is not actionable; and *Vaughn v. Teledyne, Inc.*, 628 F.2d 1214, 1220 (9th

Cir. 1980), where the court stated, in language quoted in *Ward*:

> Any tender offer or acquisition by a company of its own stock obviously would reduce the number of outstanding shares and increase the proportionate control and earnings of all shareholders who retained their stock (not just the control and earnings of the directors). It is not a violation of any securities law to fail to disclose a result that is obvious to a person with only an elementary understanding of the stock market. (Citation omitted). Nor is it necessarily a violation of the securities law to have a plan to make a stock acquisition with such a result, unless the plan includes practices that are intended to mislead or to defraud investors.

And, the court went on to say in *Ward*:

> Although impure deeds or omissions that enable defendants to implement a plan are said in *Vaughn* to constitute actionable "facts," no such deeds or omissions are alleged. . . .

Ward, 854 F.2d at 792. Thus, allegations that the defendants failed to disclose that they had a plan to acquire 80% of the corporation was not a material fact.

Another jury instruction was submitted in *Ward* concerning whether defendants had a duty to disclose their alleged plan to sell the corporation. The court rejected this instruction as an incorrect statement of the law, stating in no uncertain terms that:

> [b]efore an acquisition activity can rise to the level of materiality in our Circuit, it must involve negotiations between the defendant company and another company.

Id. at 793.

Turning to the present case, one alleged misrepresentation and various alleged omissions form the basis of Silmon's 10b-5 claims. First, it is argued that Bancorp, in its redemption letter to Silmon, incorrectly stated that Silmon's debentures would be "retired." Second, various pieces of information relating to the financial condition of Bancorp were allegedly not disclosed to Silmon, thereby preventing him from discovering that the value of the Bancorp stock was suppressed. Thus, Silmon asserts that Bancorp was able to fraudulently deceive and manipulate him into choosing cash instead of stock at the time his debentures were redeemed. Moreover, Silmon further alleges that Bancorp intended to hoard its own stock with the knowledge that the price of the stock was suppressed and that Bancorp would be sold in the future.

As a matter of law, neither the alleged misrepresentation nor the alleged omissions are material "facts." The gist of Silmon's claims in both instances is that Bancorp simply was tricking him into choosing cash instead of stock because the value of the stock was suppressed and Bancorp had plans to sell – a fact which Silmon claims he would have surmised if the misrepresentation and omissions were not made. *See* Silmon's Memorandum in Opposition to Defendants' Motion for Summary Judgment, at 13 and 16 (September 29, 1995). But, *Ward* instructs that these types of plans are not actionable unless negotiations had begun at the time of the deception. There has been no evidence presented by Silmon of any such negotiations. To the contrary, Bancorp has offered evidence that the first contact made regarding acquisition or merger was not until May 5, 1993, with officers of Premier Bank. Sometime in late October of

1993, officers for Hibernia approached Bancorp to discuss a possible merger, which was ultimately successful.

Silmon attempts to distinguish *Ward*, however, by pointing out that there is evidence of manipulation and deception by Bancorp. And, after all, *Ward* and *Vaughn* do state that "impure deeds or omissions" or misleading or fraudulent practices which enable a defendant to implement a plan are actionable. The obvious flaw in this argument is still that there is no evidence of a plan *to implement*. That is, it seems that the rule in *Ward* and *Vaughn* is that a defendant's plan to gain more control over a corporation by acquisition of stock is not actionable; the exception is if, in implementing that plan, deceptive practices are employed. Thus, if there is no evidence of a plan – that is, as *Ward* requires, commencement of negotiations – the entire claim must fail. All of the doubts as to material facts in this case are entirely metaphysical. There was no "secret merger plan." There was no buyer "in the wings" nor were there any active prospects. In the words of the panel in *Ward* there were *no negotiations* between Bancorp and another company when the debentures were redeemed.

All of Silmon's claims rest on the allegation that Bancorp intended to sell the bank at a later date with the knowledge that the price of its stock was suppressed when it redeemed Silmon's debentures. Thus, because there is no evidence that negotiations had commenced when the debentures were redeemed, his 10b-5 claims must be dismissed.

2. Due Diligence

Alternatively, regarding the alleged omissions concerning the financial condition of Bancorp, Silmon did not exercise due diligence. This inquiry focuses on whether the plaintiff "intentionally refused to investigate in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." *Dupuy v. Dupuy*, 551 F.2d 1005, 1020, *quoting* W. Prosser, § 34 at 185 (1971).

Silmon was, during most of the decade of the 1980's, an insider of FNB and its holding company, Bancorp. He was at various times FNB's principal shareholder and a director of FNB and Bancorp. He was familiar with the persons on FNB and Bancorp's Board of Directors. Furthermore, he had regularly received the bank's annual report and continued to do so in 1991; the bank also published its quarterly financial statements in the local newspaper, the Ouachita Citizen. Additionally, the financial information Silmon asserts should have been provided to him were available through public sources, such as the Federal Reserve and the FDIC, and private sources, such as SHESUNOFF and Ferguson's. *See* Transcript of Summary Judgment Hearing, at 63-71 (November 14, 1995)(Testimony of Patrick Spencer).

Also, Boydstun had approached Silmon once or twice in late 1991 and or early 1992 about Silmon's debentures and requested that Silmon sell them to him. Thus, Silmon was aware Boydstun was interested in acquiring the debentures. On July 30, 1992, Silmon received the redemption letter. He had ten days in which to make his

election for cash or stock. In the letter, it was stated that inquiries could be made to Boydstun. Silmon made none. Instead, he enlisted the help of three different men, all with different professional backgrounds whose advice he trusted. At least his CPA of many years, Walker, apparently advised him to opt for stock instead of cash. While Silmon's counsel stated at the summary judgment hearing that Silmon must have misspoke, it is nevertheless his testimony taken under oath.

In any event, it should be noted in passing that Silmon's decision to opt for cash was consistent with divestment of most of his interest in other similarly situated community banks. Thus, although this particular fact is not the basis for the court's holding, it seems unlikely he would have opted for stock.

With this background, a reasonable juror could not conclude that Silmon acted with due diligence. If he had requested information from Bancorp and they failed to provide him with accurate information or misstated material facts, then Silmon might have a claim. But, this was not the case. Bancorp merely acted within its contractual rights to redeem the debentures. Silmon requested *no* information and made *no* inquiries as he was invited to do by the redemption letter. After almost ten years as a bank director, he knew the questions to ask and the persons who had the information. Even if it is true that Silmon is an uneducated man who does not know how to read a balance sheet, he testified that he regularly "leaned on" those whom he trusted, his three aforementioned advisors, to help him make decisions. They also did not request *any* information on his behalf. Thus Silmon did absolutely nothing to discover relevant information. He

can not be said to have acted with due diligence concerning alleged omissions of financial information by Bancorp.

Bancorp's Motion for Summary Judgment regarding Silmon's 10b-5 claims is therefore **GRANTED** and those claims are **DISMISSED WITH PREJUDICE.**

V. OTHER CLAIMS ARE SIMILARLY DISMISSED

Silmon also has brought an Insider Trading claim, a Louisiana Blue Sky Law claim, and a Civil Law Fraud claim under Louisiana law. Each of these causes of action have a "materiality" component. *See* 15 U.S.C. § 78t-1(a)(Insider Trading violation only if insider possesses material information); La.R.S. 51:712(D)(as all parties agree, Louisiana Blue Sky Law claim "closely tracks" Rule 10b-5); *Concise Oil & Gas Partnership v. Louisiana Intrastate Gas Corp.*, 986 F.2d 1463, 1467-68 (5th Cir. 1993)(in a fraud action under Louisiana Civil Code article 1953, an essential element is that there be an "intentional misrepresentation or suppression of *material* facts made by one party to another")(emphasis added). Thus, for the reasons explained above regarding the materiality element of Silmon's 10b-5 claims, Bancorp's motion for summary judgment concerning these causes of action is **GRANTED** and Silmon's claims are **DISMISSED WITH PREJUDICE.**

A judgment consistent with the terms of this Memorandum Ruling shall issue herewith.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 16th day of November, 1995.

/s/ Tom Stagg
JUDGE TOM STAGG

COPY SENT

DATE 11-16-95
BY Cag
To Rountree (fax)
Barriere (fax)
Hart
Kelly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

WALTER T. SILMON — CIVIL ACTION NO. 94-1031

versus — JUDGE STAGG

FIRST BANCORP, ET AL — MAGISTRATE JUDGE PAYNE

REPORT AND RECOMMENDATION

(Filed Oct. 18, 1995)

This court dismissed the RICO claims asserted in plaintiff Walter T. Silmon's first amended complaint because it concluded that his RICO allegations were deficient in certain major respects. After plaintiff was given an opportunity to cure those deficiencies through a second amended complaint, the defendants again moved for dismissal of plaintiff's RICO claims. For the reasons which follow, plaintiff's amended RICO allegations should also be dismissed. Whatever the merit of plaintiff's securities fraud claims, his RICO allegations remain legally deficient.

I. COURSE OF PROCEEDINGS

(A) Factual Background

According to the original complaint, the origins of this action involved an alleged agreement between plaintiff Silmon and defendant J. Herbert Boydstun. In the late 1980s, Silmon and Boydstun developed a plan to obtain a

controlling ownership interest in the First National Bank of West Monroe ("the Bank"). Boydstun was the chief executive officer of the Bank, and the chairman of First Bancorp of Louisiana, Inc. ("Bancorp"), a holding company which acquired ownership of the Bank in 1987. In order to finance the operations of Bancorp, Silmon purchased 10 subordinated debentures in the amount of $100,000 each. The debentures bore interest at the rate of 10% per annum and were convertible into shares of Bancorp stock at the rate of $23.75 per share.

In addition to his interest in the debentures, Silmon owned a substantial amount of stock in the Bank. In 1987, Boydstun allegedly persuaded Silmon to sign a number of documents, including a shareholder's agreement, which "tied up Plaintiff's stock," and permitted Boydstun to gain greater control over Bancorp. According to plaintiff, he "reads with difficulty," and signed these agreements based on Boydstun's misrepresentation "that the effect of the agreements was to give Plaintiff an equal voice in the management of Bank and Bancorp." Plaintiff later disposed of his stock in 1990, pursuant to an agreement with Boydstun and Bancorp.

In the spring or early summer of 1992, Boydstun offered to purchase Silmon's debentures, but Silmon rejected the offer. On July 30, 1992, Bancorp advised Silmon in writing that his debentures had been called for redemption effective August 31, 1992. At that point, plaintiff had the option of accepting the redemption value of the debentures, $1,051,110.10, or converting the debentures into stock at the price of $23.75 per share. Plaintiff accepted the cash redemption price. On the same date as

the redemption, new debentures were issued to Boydstun and other officers and directors of the Bank.

On July 31, 1994, Bancorp was acquired by Hibernia Corporation at a price of $155.67 for each Bancorp share. If, almost two years earlier, Silmon had converted his debentures into 44,257 shares of stock instead of accepting $1,051,111.10 in cash, his shares would have had a value of $6,889,532.20 on the acquisition date.

(B) Original Complaint

In his original complaint, plaintiff sued Bancorp, Boydstun and five other individuals who were officers or directors of the Bank. He alleged that the defendants made certain material misrepresentations or omissions at the time of the redemption. Among other things, he alleged that the defendants should have informed him that once his debentures were redeemed, "corporate insiders intended to . . . become the owners of [similar] corporate debentures." Plaintiff alleged that had he been aware of those intentions, he would have assumed that Boydstun and others had plans to market the Bank or Bancorp, and that he would have converted the debentures to shares of stock. The original complaint alleged that the defendants' conduct violated various federal securities laws and regulations, including Rule 10b-5, and state blue sky laws, and also asserted state law claims of fraud and intentional interference with contract rights.[1]

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[1] These claims are the subject of pending motions for summary judgment filed by the various defendants.

(C) First Amended Complaint

In his First Amended Complaint ("FAC"), Silmon asserted civil RICO claims against defendants Bancorp and Boydstun pursuant to 18 U.S.C. §1961, et seq. He alleged that these defendants acquired interests in and control of an enterprise, i.e., the Bank or Bancorp, through a pattern of racketeering activity, in violation of §1962(b); conducted and participated in the conduct of the enterprise's affairs through a pattern of racketeering activity, in violation of §1962(c); and entered a conspiracy to engage in these wrongful acts, in violation of §1962(d). In addition to the alleged securities fraud in connection with the redemption of the debentures, plaintiff contended that the defendants had engaged in other racketeering acts, including:

> (1) wire fraud and mail fraud in 1987, when Boydstun verbally misrepresented the terms of the written contracts which restricted plaintiff's stock ownership; although these misrepresentations were made during the course of a face-to-face meeting, plaintiff alleged that mail fraud and wire fraud were committed because Boydstun had the contracts prepared by attorneys in Dallas, Texas, and because the mails and telephone were used in connection with the preparation of those documents and their transmission to Boydstun;
>
> (2) bank fraud in 1990, in connection with the agreement whereby plaintiff transferred his stock to the bank in exchange for a promissory note;
>
> (3) securities fraud in 1992-93, when defendants purchased stock from former employees

of the Bank who owned stock in the Bank's Employee Stock Ownership Plan (ESOP);

(4) mail fraud in 1994, when the defendants' counsel "made several misstatements of fact" in letters that "tended to conceal the pervasiveness of the [earlier] fraudulent conduct. . . . "

(D) The First Motion to Dismiss

The defendants moved to dismiss the RICO claims pursuant to Rule 12(b) (6), arguing that Silmon's claims were legally deficient in a number of respects. Chief among the arguments for dismissal was the defendants' contention that Silmon had failed to allege two predicate acts of racketeering activity, and thus could not show a "pattern of racketeering activity" as required by the statute. See 18 U.S.C. §1961(5) (" 'pattern of racketeering activity, requires at least two acts of racketeering. . . . ") After extensive briefing and the filing of a RICO Case Statement by plaintiff in accordance with this court's standing order, Magistrate Judge Simon issued a report and recommendation ("R&R") on February 8, 1995 which recommended that the motion to dismiss be granted, and that plaintiff's RICO claims be dismissed.

Magistrate Judge Simon concluded that plaintiff had failed to sufficiently allege two predicate acts because (1) the allegations concerning verbal misrepresentations in a face-to-face meeting between Silmon and Boydstun in 1987 could not provide the basis for valid claims of mail fraud or wire fraud; and (2) the allegations regarding the 1987 conduct, as well as the other alleged acts of fraudulent conduct, fell "far short of stating the detail required

for alleging predicate acts . . . in a RICO case statement." Magistrate Judge Simon also concluded that "because Silmon has failed to properly allege the predicate acts he claims, he has failed to allege the continuity required to show a RICO violation," and that for the same reason it could not be determined whether the defendants were "RICO persons" who posed a continuous threat of racketeering activity. Finally, dismissal of plaintiff's §1962(b) claims was recommended on the additional basis that plaintiff failed to allege that his injury resulted from the defendants' acquisition or maintenance of an interest in the enterprise.

On June 13, 1995, Judge Stagg adopted the R&R and issued an order dismissing plaintiff's RICO claims. Plaintiffs then sought leave to file a second amended complaint ("SAC") in an effort to cure the deficiencies that had provided the basis for dismissal, and also filed an amended RICO case statement. The SAC added four former directors or officers of the Bank as RICO defendants.[2] On July 17, 1995, the court overruled the defendants' objections to allowing plaintiff leave to file the proposed amendment, observing that "[t]he question of whether plaintiff has cured those pleading deficiencies would be more appropriately addressed through dispositive

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[2] The additional RICO defendants named in the second amended complaint are Robert B. McLeod (director of Bank and Bancorp who also served as attorney for both corporations); Patrick L. Spencer (a vice-president of the Bank); Malcom E. Maddox (president of the Bank); and R.L. Davis, Jr. (director of the Bank and Bancorp).

motion practice."[3] The defendants then filed a second motion to dismiss, which asserts that plaintiff still has not satisfied the requirement of sufficiently alleging two predicate acts, and that he has not overcome the other deficiencies set forth in the first R&R.

II. LAW AND ANALYSIS

(A) Requirements of Rule 12(b) (6) and Rule 9(b)

When a defendant moves for dismissal under Rule 12(b)(6), the general rule is that the court will accept all well-pleaded facts as true, consider the allegations of the complaint in the light most favorable to the plaintiff, and refuse to grant dismissal unless the allegations do not support relief on any possible theory. *Green v. State Bar of Texas*, 27 F.3d 1083 (5th Cir. 1994); *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992). The general rule of "notice pleading" provided by Rule 8(a) requires only that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

In this case, however, strict rules of pleading apply because all of the alleged predicate acts which form the basis of the alleged pattern of racketeering activity involve claims of fraud. Fraud claims require the court to review the allegations of the complaint with heightened scrutiny under Rule 9(b), which provides that:

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[3] In the July 17, 1995 order, plaintiff's allegations in paragraphs 128-130 of the second amended complaint, regarding an alleged predicate act of extortion, were ordered stricken pursuant to Rule 12(f).

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

The minimum allegations required by Rule 9(b) in a fraud case are:

> (1) the specific time, place, and contents of the false representations;
>
> (2) the identity of the person making the false representations; and
>
> (3) what the person obtained by making the representations.

See, e.g., Melder v. Morris, 27 F.3d 1097 (1994); *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061 (1994).

As indicated by three recent Fifth Circuit decisions which affirmed Rule 12(b)(6) dismissal of securities fraud claims, *see Melder, Tuchman* and *Shushany v. Allwaste, Inc.*, 992 F.2d 517 (5th Cir. 1993), the rule that the circumstances constituting fraud must be stated with particularity is hardly a pro forma requirement. Rule 9(b) "provides defendants with fair notice of the plaintiffs' claims, protects defendants from harm to their reputation and goodwill, reduces the number of strike suits, and prevents plaintiffs from filing baseless claims and then attempting to discover unknown wrongs." *Tuchman, supra*, 14 F.3d, at 1067. These considerations are particularly important in the RICO context. Because "[c]ivil RICO is an unusually potent weapon – the litigation equivalent of a thermonuclear device," federal courts

have recognized that "it would be unjust if a RICO plaintiff could defeat a motion to dismiss simply by asserting an inequity attributable to a defendant's conduct and tacking on the self-serving conclusion that the conduct amounts to racketeering." *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 44 (1st Cir. 1991).

(B) In Search of A Second Predicate Act

For the purposes of this motion to dismiss, the parties agree that one predicate act is established by the allegations regarding securities fraud in connection with the redemption of Silmon's debentures in 1992.[4] The defendants urge, however, that plaintiff has failed to allege a second act of "racketeering activity." 18 U.S.C. §1961(1) defines "racketeering activity" as any act or threat involving numerous delineated offenses chargeable under state or federal law. Plaintiff has attempted to allege a number of other predicate acts, and those allegations will now be considered in turn.

(1) Mail Fraud and Wire Fraud in 1987?

Plaintiff continues to allege wire fraud (18 U.S.C. §1343) and mail fraud (*id.*, §1341) in connection with the

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[4] While the defendants do not concede that plaintiffs have alleged valid securities fraud claims in connection with the redemption of the debentures, they acknowledge that since their separate motion to dismiss those allegations under Rule 12(b)(6) was denied, it is the law of the case that those allegations are sufficient to state a claim on the face of the pleadings.

execution of the 1987 contracts. The basis for his argument is that the contracts were mailed to Boydstun by his attorneys in Dallas, and that Boydstun discussed the details of those contracts in telephone conversations with his attorneys. (SAC, 80-82). Conceding that the contracts themselves were not fraudulent, Silmon nevertheless urges that these offenses occurred because mail or telephone communications were used to further Boydstun's alleged scheme to trick him into restricting his stock ownership rights. The alleged scheme, however, was consummated by verbal misrepresentations in a face-to-face meeting between Silmon and Boydstun.

In the SAC, plaintiff has provided some additional detail regarding the frequency of the telephone and mail communications at issue.[5] These additional allegations are somewhat responsive to the first R&R's finding that the allegations of wire fraud and mail fraud in 1987 contain insufficient detail. Nevertheless, the amended allegations do not overcome the more substantive deficiency identified in the first R&R with respect to the alleged 1987 predicate acts. The alleged misrepresentations occurred in the meeting between Silmon and Boydstun, and, as Magistrate Judge Simon found, "[m]isrepresentations that occur[ ] at a meeting do not

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[5] For example, in paragraph 82 plaintiff alleges that "[i]t was necessary to the execution of Boydstun's scheme to defraud plaintiff that he and another associate . . . communicate frequently by United States mail and interstate wire services with lawyers in Texas who prepared the contracts. . . . The contracts were modified in response to suggestions . . . made by telephone from Louisiana to Texas and the contracts or drafts of the contracts were mailed from Texas to Louisiana."

constitute wire or mail fraud, and thus could not constitute racketeering activity." *Tel-Phonic Services. Inc. v. TBS Int'l., Inc.*, 975 F.2d 1134, 1139 (5th Cir. 1992).

In his opposition to the motion to dismiss, plaintiff argues that the earlier ruling misconstrued the holding of *Tel-Phonic Services*. He argues that the R&R did not take into account that mail fraud or wire fraud may be committed any time that the mails or telephone are used for the purpose of executing a fraudulent scheme, even when the mailing or wire transmission is not inherently fraudulent or deceptive. *See. e.g, Smith v. Our Lady of the Lake Hosp., Inc.*, 960 F.2d 439, 445 (5th Cir. 1992).

The court has no occasion to revisit the determination made in the first R&R that alleged misrepresentations made during the course of a meeting in 1987 cannot form the basis for wire fraud or mail fraud. Plaintiff was given leave to file an amended complaint in order to attempt to cure the deficiencies noted in the earlier R&R, and not so that he could reargue issues decided in that ruling. In that regard, it should be noted that plaintiff also availed himself of the opportunity to file objections to the R&R, which were considered and overruled by the district judge. Thus, this is effectively the third time that the plaintiff is asserting the same legal argument (i.e., that the subject events in 1987 constitute mail fraud or wire fraud). Our answer has not changed.

The nature of the court's holding, then and now, is not that it is necessary for the wire or mail communication to be deceptive, or even for that communication to be an essential element of the alleged scheme. It is unquestionably necessary, however, under the plain wording of

the criminal statutes and the jurisprudence interpreting those statutes, that the mail or wire communication serve the purpose of furthering or executing the fraudulent scheme. *See, e.g., McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 792 n. 10 (1st Cir. 1990), *cert. denied*, 498 U.S. 992 (1991). According to Silmon's own allegations, the fraud occurred during a meeting when Boydstun misrepresented the contents of legitimate contracts to Silmon. The fact that Boydstun may have earlier received the contracts through the mail, or discussed them with his attorneys by telephone, is so completely unrelated to the alleged fraud that it cannot be reasonably concluded that these means of communication were used to "execute" the fraudulent scheme.[6] As our Supreme Court has observed, "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of a fraudulent scheme. But it did not do this. . . . " *United States v. Maze*, 414 U.S. 395, 405, 94 S.Ct. 645, 651, 38 L.Ed.2d 603 (1973). In summary, the court concludes, once again, that the 1987 allegations do not satisfy the requirement of a second predicate act.[7]

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[6] It is not alleged that the Texas attorneys who were parties to the mail and telephone communications had knowledge of the alleged fraudulent scheme.

[7] In reference to the 1987 contracts, plaintiff also alleges that "Boydstun committed securities fraud when he tricked plaintiff into signing agreements that gave Boydstun options to acquire plaintiff's securities." (SAC, 83). And in his amended case statement, plaintiff contends that Boydstun committed bank fraud by having the Bank pay legal fees that he incurred in connection with the preparation of those contracts. These allegations receive little attention in plaintiff's memorandum in

(2) Bank Fraud in 1990?

In the SAC and his memorandum in opposition to the motion to dismiss, plaintiff alleges that Boydstun and McLeod committed bank fraud when they facilitated an exchange agreement between Silmon and the Bank in 1990. Under the exchange, the Bank received Silmon's bank stock, which had a value of approximately $960,000.00, and Silmon received the Bank's interest in "the Caldwell Drilling Note," a promissory note that had a principal balance of $1,160,000.00. According to Silmon, Boydstun and McLeod persuaded the Bank to enter an unfavorable exchange (from the Bank's perspective) in order to keep Boydstun from being sued by Silmon on another promissory note. Plaintiff contends that by concealing Boydstun's personal interest in the agreement from the Bank, these defendants defrauded the Bank of assets by means of false pretenses, in violation of 18 U.S.C. §1344. Because Boydstun used the mail and the telephone in obtaining federal regulatory approval for this exchange, plaintiff also argues that acts of mail and wire fraud were committed.

In claiming that the defendants engaged in fraud, plaintiff may not rest on conclusory allegations. Instead, as required by Rule 9(b) of the Federal Rules of Civil

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opposition to the motion to dismiss, are conclusory in nature and are unsupported by adequate factual averments. For the same reasons discussed in the text, *infra*, in connection with plaintiff's securities fraud claim involving purchases of bank stock by the defendants, these conclusory allegations do not satisfy Rule 9(b)'s requirement that the circumstances constituting fraud be stated with particularity.

Procedure, he must state with particularity the underlying circumstances which form the basis of the fraudulent conduct. In this instance, plaintiff concludes that the transfer was against the Bank's financial interests merely because the principal balance of the Caldwell Drilling note exceeded the alleged value of his stock. Yet he alleges no *facts* which support that assumption. It is common knowledge that the principal amount due on a promissory note is not necessarily reflective of the note's value as an asset. A more important consideration is the debtor's likely ability to pay the note balance when it becomes due, and plaintiff's complaint is strangely silent as to that issue. Based on the mere allegation that the balance of the note exceeded the value of Silmon's stock, the allegations provide no basis for concluding that the exchange was not in the Bank's best interest, or resulted in a loss to the Bank. The conduct alleged, even if true, does not rise to the level of bank fraud, and is insufficient to satisfy the requirements for a RICO predicate act.

(3) Other Acts of Securities Fraud?

Plaintiff also contends that securities fraud was committed on almost any occasion between 1992 and 1994 when any defendant purchased bank stock. For example, plaintiff urges that violations of securities laws occurred in 1992 and 1993 when defendants caused the Bank to purchase ESOP stock owned by former bank employees, and in some transactions where the individual defendants purchased stock for themselves. He also alleges that securities laws were violated when the Bank

redeemed debentures owned by the heirs of J.W. Roberson. The common thread for all of these securities fraud allegations is that the defendants allegedly knew, at the time of the transactions, that the value of the Bank's stock was greater than the purchase price (or, in the case of debentures, greater than the rate of convertible exchange), and failed to disclose this fact to the seller.

The plaintiffs' federal securities fraud claims require a showing of (1) a misstatement or omission (2) of a material fact (3) made with scienter (4) on which the plaintiff relied (5) that proximately caused the plaintiff's injury. *Shushany v. Allwaste, Inc., supra,* 992 F.2d, at 520. Magistrate Judge Simon concluded that the allegations in the FAC concerning the ESOP transactions, the Heirs of Roberson and the other stock transactions contained insufficient detail regarding the time, place and contents of the alleged misrepresentations or omissions. While the SAC provides more details regarding some of the transactions, notably absent are meaningful factual allegations regarding how or why the defendants knew that the value of the Bank's stock was greater than represented at the time of the transactions.

With respect to ESOP purchases in both 1992 and 1993, for example, there are vague allegations that the defendants should have known that the value of the stock was worth more than its purchase price, or that it would shortly increase in value. There are also allegations that the value of the stock was "suppressed" in an appraisal made for the defendants. See, e.g., SAC, 102 ("Defendants knew that the stock was worth a great deal more than $26.61 per share, a suppressed value placed on the ESOP stock by Austin Associates after consultation with

Spencer.") Plaintiff does not allege, however, any facts in support of his conclusions that the value of the stock actually was higher than the purchase price at the time of these transactions and that the value stated in the appraisal was inaccurate; nor does he allege any facts in support of his conclusion that the defendants had knowledge that the actual value of the stock was higher than the amount paid.

Perhaps most significantly, plaintiff also does not allege that any of these purchases of Bank stock occurred after the Bank entered merger negotiations with Hibernia. Instead, the premise of his securities fraud claims seems to be that the defendants' anticipating that at some point the Bank would be purchased at a favorable price, set about to purchase or control all of the stock in the Bank that they could, in order to maximize their profits if and when a buyer materialized. See, e.g., SAC, 93 ("By the end of 1991, Boydstun, McLeod and Spencer realized that market conditions had become favorable for bank sales and mergers.") Even if these allegations are true, they do not state a claim for securities fraud. The defendants would have been under no obligation to disclose their hopes of finding a buyer. "The mere 'intention' to pursue a possible merger at some time in the future, without more, is simply not a material fact under rule 10b-5." *Panfil v. ACC Corp.*, 768 F.Supp. 54, 58 (W.D.N.Y.), aff'd, 952 F.2d 394 (2d Cir. 1991). *See also Ward v. Succession of Freeman*, 854 F.2d 870, 793 (5th Cir. 1988), *cert. denied*, 490 U.S. 1065 ("Before an acquisition activity can rise to the

level of materiality in our Circuit, it must involve negotiations between the defendant company and another company.")[8]

In summary, the alleged predicates involving the purchase of bank stock do not satisfy the requirements of Rule 9(b).

(4) Fraud Against Hibernia?

Plaintiff also alleges that in the merger negotiations between Hibernia and Bancorp, Boydstun made certain false statements to Hibernia regarding the reasons the debentures had been issued to Silmon, the reasons the Bank repurchased Silmon's stock and the reasons for the acquisition of ESOP stock. Plaintiff alleges that in connection with the merger, Boydstun telecopied an accounting memorandum to Bancorp's lead attorney, and was also aware that the information he provided to Hibernia

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[8] Plaintiff does identify two stock transactions that allegedly occurred at some point in 1993 after the Bank had been contacted by Premier Bank regarding the possibility of a merger. One transaction involves the purchase of stock allocated to the ESOP account of Johnny James (Amended RICO Case Statement, p. 22.) The other involves the Bank's pre-merger acquisition of Southern National Bank. (SAC, 113-17). Plaintiff alleges that if the defendants had informed Southern that the Bank was negotiating with Premier, Southern's shareholders would have been able to able to obtain a better price for their own stock (apparently on the premise that the Bank needed to acquire Southern in order to make itself more attractive to Premier). Once again, the allegations that these transactions involved material misrepresentations or omissions by the defendants are highly speculative and are unsupported by specific factual averments.

would be reported to the SEC. Thus, plaintiff contends, the misrepresentations to Hibernia involve predicate acts of wire fraud, mail fraud and securities fraud.

Plaintiff has not alleged facts in support of his allegation that the representations made to Hibernia were false; nor has he alleged whether the representations were material to Hibernia, or whether they were relied upon by Hibernia; nor has he alleged more than a remote connection between the use of mail or wire services and the alleged fraud. Once again, the allegations of fraud do not satisfy the requirements of Rule 9(b).

(5) Fraud by Concealment?

Finally, plaintiff alleges that McLeod, acting as counsel for Bancorp and Boydstun, committed mail fraud in January of 1994. SAC, 125-27; Amended RICO Case Statement, pp. 23-24. The circumstances of the "fraud" are that after plaintiff's counsel sent the Bank letters questioning the circumstances surrounding the acquisition of his debentures, McLeod responded with correspondence defending his clients' position. Plaintiff claims that because McLeod made statements which were false or misleading, the letter was a fraudulent attempt to conceal earlier wrongdoing, and its mailing was a violation of federal law.

This claim, together with the previously stricken "extortion" claim, see footnote 3, *supra*, represents the outer limits of plaintiff's attempt to characterize virtually any mailing or use of the telephone by defendants that bore even the slightest relationship to this controversy as

an act of mail fraud or wire fraud. On the face of the pleadings, there is no basis for concluding that the referenced correspondence was anything other than McLeod's representations of his client's position on disputed factual and legal issues. Even if some of the factual representations made in the correspondence were incorrect, plaintiff has not alleged sufficient facts in support of his conclusory allegation that by contesting the validity of plaintiff's claim on the eve of litigation, McLeod was engaging in a fraudulent scheme. The allegations of fraudulent concealment do not establish a predicate act.

* * *

In summary, none of the many allegations contained in the second amended complaint and the amended RICO case statement satisfy the requirement of a second predicate act. For that reason alone, the motion to dismiss should be granted.

(C) Other RICO Pleading Deficiencies

(1) No Pattern of Racketeering Activity

The requirement of two predicate acts is a prerequisite forshowing [sic] a pattern of racketeering activity, but the plaintiff must satisfy two other requirements: relatedness and continuity. "RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239, 109 S.Ct.

2893, 2900, 106 L.Ed.2d 195 (1989)(emphasis by the Court).

Magistrate Judge Simon observed in the R&R which addressed the first motion to dismiss that plaintiff's failure to allege two predicate acts renders it "impossible to make a decision as to whether sufficient continuity has been alleged . . . or if any predicate acts would be sufficiently related." That consideration applies with equal force now. Furthermore, even if one or more of the allegations discussed above could qualify as valid predicate acts, the continuity requirement in a case such as this one, where it is not alleged that racketeering acts will extend indefinitely into the future, is only satisfied upon a showing of "a series of related predicates extending over a substantial period of time." *H.J., Inc.*, 109 S.Ct., at 2902. "Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. Congress was concerned in RICO with long-term criminal conduct." *Id.* Even if the court were able to conclude that a second predicate act has been validly alleged (e.g., one of the many securities fraud claims asserted in connection with the stock purchases), the continuity requirement would not be satisfied.[9]

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[9] For the same reason, plaintiff has not alleged facts sufficient to establish that the defendants are "RICO persons," i.e., persons who pose or have posed a continuous threat of criminal activity. *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 242 (5th Cir. 1988), *cert. denied*, 489 U.S. 1079 (1989).

(2) Insufficiency of Conspiracy Allegations

Plaintiff has alleged that the defendants are liable pursuant to §1962(d) because they conspired to violate §1962(b) & (c). There are no factual allegations which support the existence of a conspiracy or any other type of agreement for concerted action among the defendants. "[B]ecause the core of a RICO civil conspiracy is an agreement to commit predicate acts, a RICO civil conspiracy complaint, at the very least, must allege specifically such an agreement." *Crowe v. Henry*, 43 F.3d 198, 206 (5th Cir. 1995). A conspiracy claim is deficient if the plaintiff merely pleads "the conclusory allegation that the defendants herein 'conspired' " but fails to allege facts implying any agreement to commit predicate acts of racketeering." *Id. See also Miranda, supra*, 948 F.2d, at 47. Even if plaintiff could state a cause of action against one or more of the individual defendants pursuant to subsections (b) or (c) of the statute, the conspiracy claim is wholly unsupported by factual allegations and should be dismissed.

(3) Insufficient Allegations As to Individual Defendants

Even if plaintiff had alleged two or more valid predicate acts and otherwise met the requirements for alleging a pattern, the only proper defendants would be those involved in two or more predicates. While Boydstun's involvement is alleged with respect to most of the subject transactions, the allegations against the remaining individual defendants (McLeod, Spencer, Maddox and Davis) are sparse by comparison. Where multiple defendants are

accused of participating in a scheme to defraud, the plaintiff must satisfy the requirements of Rule 9(b) with respect to each defendant, and should, at a minimum, apprise each defendant of the nature of his alleged participation in the fraud. *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993); *Moore v. Kayport Package Express Inc.*, 885 F.2d 531, 541 (9th Cir. 1989). McLeod, Spencer, Maddox and Davis are independently entitled to dismissal on the ground that the plaintiff has not made sufficient allegations of their involvement in the alleged pattern of racketeering activity.

* * *

Accordingly, **IT IS RECOMMENDED** that the defendants' motion to dismiss plaintiff's civil RICO claims be **GRANTED**, and that all claims asserted by plaintiff against defendants Hibernia Corporation, J. Herbert Boydstun, Robert P. McLeod, Patrick L. Spencer, Malcom E. Maddox and R.L. Davis, Jr. in Counts 6, 7, 8 and 9 of the Second Amended Complaint be **DISMISSED.**

Objections

Under the provisions of 28 U.S.C. section 636(B)(1)(C), and Fed.R.Civ. Proc. 72(b), the parties have ten (10) business days from receipt of this Report and Recommendation to file specific, written objections with the Clerk. Timely objections will be considered by the district judge prior to a final ruling.

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN

(10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE, OR WITHIN THE TIME GRANTED PURSUANT TO FED.R.CIV. PROC. 6(B), SHALL BAR AN AGGRIEVED PARTY FROM ATTACKING THE FACTUAL FINDINGS ON APPEAL EXCEPT UPON GROUNDS OF PLAIN ERROR OR MANIFEST INJUSTICE. SEE *THOMAS V. ARN*, 474 U.S. 140, 106 S.CT. 466 (1985); *CARTER V. COLLINS*, 918 F.2D 1198, 1203 (5TH CIR. 1990).

THUS DONE AND SIGNED at Shreveport, Louisiana, on this the 18th day of October, 1995.

/s/ Roy S. Payne
ROY S. PAYNE
UNITED STATES
MAGISTRATE JUDGE

COPY SENT
DATE: 10/18/95
BY: Illegible
TO: Rountree
Barrier
Hart
Kelly
Crawford
Trascher

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

WALTER T. SILMON — CIVIL ACTION NO. 94-1031

versus — JUDGE STAGG

FIRST BANCORP, ET AL — MAGISTRATE JUDGE PAYNE

ORDER

(Filed Oct. 31, 1995)

For the reasons stated in the Report and Recommendation of the Magistrate Judge previously filed herein, having thoroughly reviewed the record and the objections filed by the parties and concurring with the Magistrate Judge's findings under the applicable law;

IT IS ORDERED that the defendants' motion to dismiss plaintiff's civil RICO claims is **GRANTED,** and that all such claims asserted by plaintiff against defendants Hibernia Corporation, J. Herbert Boydstun, Robert P. McLeod, Patrick L. Spencer, Malcom E. Maddox and R.L. Davis, Jr. in Counts 6, 7, 8 and 9 of the Second Amended Complaint are **DISMISSED.**

THUS DONE AND SIGNED at Shreveport, Louisiana, this 30th day of October, 1995.

JUDGMENT ENTERED 10/31/95
BY Illegible
COPY TO: Rountree Kelly
Barriere Crawford
Hart Trascher

/s/ Tom Stagg
TOM STAGG
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

WALTER T. SILMON

versus

CIVIL ACTION NO. 94-1031
JUDGE TOM STAGG

FIRST BANCORP OF LOUISIANA, INC., J. HERBERT BOYDSTUN, ROBERT P. McLEOD, DELMA CARTER, R. L. DAVIS JR., MALCOLM E. MADDOX and PATRICK L. SPENCER

JUDGMENT

(Filed Nov. 16, 1995)

For the reasons assigned in the foregoing Memorandum Ruling, the defendants' Motion For Summary Judgment is **GRANTED** and Walter Silmon's remaining claims pursuant to §10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)), Rule 10b-5 (17 C.F.R. § 240.10b-5), 15 U.S.C. § 78t1 (insider trading), La.R.S. 51:712(D) (Louisiana Blue Sky Law), and Louisiana Civil Code article 1953 against the defendants are **DISMISSED WITH PREJUDICE.**

THUS DONE AND SIGNED at Shreveport, Louisiana, this 16th day of November, 1995.

JUDGMENT ENTERED 11/16/95
BY Celia Gallagher
COPY TO: Rountree (fax)
Barriere (fax)
Hart
Kelly

/s/ Tom Stagg
JUDGE TOM STAGG

STATUTORY AND REGULATORY PROVISIONS INVOLVED

15 U.S.C. §78(c) Definition of a security

(10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

(11) The term "equity security" means any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and

regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.

15 U.S.C. § 78j Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 (17 C.F.R. § 240.10b-5) Employment of manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or the mails or any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

15 U.S.C. § 78t Liability of controlling persons

(a) Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

18 U.S.C. § 1962 Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be lawful under this subsection if the securities of the issuer held by the purchaser, the

members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

15 U.S.C. § 78(c) Definition of a security

(10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine

months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

(11) The term "equity security" means any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier

according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice –

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of

false or fraudulent pretenses, representations, or promises; shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1346. Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

LA. R.S. 14:66. Extortion

Extortion is the communication of threats to another with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity of any description. The following kinds of threats shall be sufficient to constitute extortion:

(1) A threat to do any unlawful injury to the person or property of the individual threatened or of any member of his family or of any other person held dear to him;

(2) A threat to accuse the individual threatened or any member of his family or any other person held dear to him of any crime;

(3) A threat to expose or impute any deformity or disgrace to the individual threatened or to any member of his family or to any other person held dear to him;

(4) A threat to expose any secret affecting the individual threatened or any member of his family or any other person held dear to him;

(5) A threat to do any other harm.

Whoever commits the crime of extortion shall be imprisoned at hard labor for not less than one nor more than fifteen years.

No. 96-1101

Supreme Court, U.S.
FILED
MAR 14 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

WALTER T. SILMON,

Petitioner,

vs.

FIRST BANCORP OF LOUISIANA, INC., J. HERBERT BOYDSTUN, ROBERT P. MCLEOD, DELMA CARTER, R. L. DAVIS, JR., MALCOLM E. MADDOX and PATRICK L. SPENCER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS FIRST BANCORP OF LOUISIANA, INC. AND HIBERNIA CORPORATION

BRENT B. BARRIERE, T.A.
Counsel of Record
HARRY ROSENBERG
TANIA TETLOW
PHELPS DUNBAR, L.L.P.
Attorneys for Respondents First Bancorp of Louisiana, Inc. and Hibernia Corporation
400 Poydras Street
Texaco Center, 30th Floor
New Orleans, Louisiana 70130
(504) 566-1311

QUESTION PRESENTED

Did the district court and court of appeals err in concluding (i) that the mere possibility of the sale of a bank at some unknown time to an unknown purchaser is not material unless and until there are negotiations of a possible sale and (ii) that a former officer and director failed to act with due diligence when he failed to make any inquiry or review any of the mass of readily available financial documents in connection with his investment decision.

STATEMENT PURSUANT TO RULE 29.6

Hibernia Corporation is the successor in interest to First Bancorp of Louisiana, Inc. Hibernia Corporation has no parent company and no non-wholly owned subsidiaries.

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STATEMENT OF THE CASE

From 1978 to 1990, petitioner Walter T. Silmon ("Silmon") was a principal shareholder, director and sometimes employee of First National Bank of West Monroe (the "Bank") and its successor, First Bancorp of Louisiana, Inc., ("First Bancorp"). In 1990, Silmon sold his substantial holdings of First Bancorp stock to First Bancorp and its subsidiary in a complex transaction which involved both substantial cost and time. A little more than two years later, in August, 1992, Silmon was required to decide whether to accept cash for his First Bancorp debentures or convert them to common stock. He elected to receive cash, but came to regret his decision when in the summer of 1994, First Bancorp was purchased by Hibernia National Bank ("Hibernia").

Silmon is a prominent and successful West Monroe, Louisiana businessman. In approximately 1978, Silmon began purchasing blocks of Bank stock, and in 1981 he was invited to join the Bank Board. After the 1985 death of the Bank's controlling shareholder, Silmon teamed with respondent, J. Herbert Boydstun ("Boydstun"), an officer of the Bank, and another banker to form a holding company which would purchase the stock of the former controlling shareholder and stock owned by non-Louisiana residents. As a result of the transaction, Silmon became the Bank's single largest individual shareholder.

In May, 1987, Boydstun and Silmon received a commitment from AmSouth Bank, N.A. ("AmSouth") to finance the stock purchase, conditioned upon the provision of $1,000,000 of subordinated debt or equity. It was agreed that this condition would be satisfied by the issuance of convertible subordinated debentures. Silmon desired that he alone would acquire the debentures. Accordingly, when First Bancorp was formed in

August, 1987, Silmon was issued ten convertible subordinated debentures. Silmon was granted the right to convert the debentures to First Bancorp stock; conversion was entirely unilateral and could be exercised at any time. Conversely, First Bancorp was granted the right to redeem the debentures at any time upon thirty days notice. Silmon was free to convert during the notice period.

Silmon was a member of the First Bancorp and Bank Boards and regularly attended monthly meetings of both. He was also an active member of various committees, including the loan committee. At First Bancorp meetings, Silmon received extensive and detailed materials relating to the performance of the Bank, including monthly, quarterly and annual internal financial statements, annual financial statements audited by KPMG Peat Marwick both for the Bank and First Bancorp, statements of expenses, statements of problem loans, projections of future performance and projections of future cash flow. Further, detailed analyses and other materials from various sources available to the general public, including *Sheshunoff, Ferguson's* and federal regulators, were routinely distributed to Board members.

On October 3, 1987, barely one month after the formation of First Bancorp, Boydstun and other Bank officers learned from press reports that Silmon had pleaded guilty to a federal felony offense. Silmon had not previously disclosed his criminal investigation to First Bancorp nor the Office of the Comptroller of the Currency.

Following his guilty plea, Silmon became increasingly disenchanted with his investment in First Bancorp. The guilty plea also resulted in the termination of Silmon's employment with the Bank. And in 1990, Silmon resigned from the First Bancorp and Bank Boards.

After his resignation, Silmon continued to receive financial information concerning First Bancorp and the Bank. For example, Silmon received the Bank's annual report for 1991. As required by federal regulation, the Bank published quarterly financial statements in the *Ouachita Citizen*, a newspaper of general circulation in West Monroe. While these materials were readily available to Silmon, he has acknowledged that he had no interest in them.

In February, 1992, Boydstun advised the Federal Reserve Bank and Whitney National Bank, the successor lender to AmSouth, that Silmon's debentures would be retired and that new debentures would be issued to officers of the Bank and First Bancorp. Neither objected.

A notice of redemption was delivered to Silmon by hand and by certified mail on July 30, 1992. The notice confirmed Silmon's option to take First Bancorp stock in lieu of cash. Silmon was specifically invited to contact Boydstun should he have any questions or inquiries concerning the redemption, First Bancorp or the Bank. Silmon did not contact Boydstun or anyone else associated with the Bank. Though Silmon was aware of the mountain of available financial information from his years as a First Bancorp and Bank director, he did not request any information or documents.

Silmon did consult with persons he considered to be experts. Specifically, Silmon spoke with his long-time CPA who advised him to convert the debentures to stock. Silmon also spoke with a prominent Monroe banker and attorney who noted that there was no market for the sale of community banks like First Bancorp and that the investment would be highly illiquid.

Silmon let the conversion date pass without giving notice to First Bancorp. On the date for redemption, Silmon appeared

at the Bank's office and collected his funds. First Bancorp partially financed the redemption by issuing new debentures on that same day. These new debentures differed from Silmon's in that they involved different face amounts and included additional restrictions on transferability, and the conversion price was slightly increased.

Silmon had no contact with First Bancorp until December, 1993. He read reports of a proposed merger involving First Bancorp and Premier National Bank, and his counsel wrote to First Bancorp suggesting that its officers knew of the proposed merger in the summer of 1992. In fact, the first contact concerning a sale occurred in May, 1993, when Boydstun was initially approached by Premier officers. After press reports concerning a possible transaction between First Bancorp and Premier appeared in October, 1993, Hibernia contacted First Bancorp. A merger with Hibernia was announced in November, 1993 and was consummated in August, 1994. Although Silmon had made a unilateral decision in the summer of 1992 to accept cash for his debentures, in January, 1994, he demanded that transaction be reversed and he be granted First Bancorp stock which he could tender to Hibernia. That demand was rejected, and this litigation followed.

REASONS FOR DENYING THE WRIT

After affording Silmon an admittedly unorthodox summary judgment hearing to provide him with every opportunity to create a fact issue for trial, the trial court concluded that Silmon had demonstrated neither that he was the victim of any material misrepresentations or omissions causing injury nor that he had acted with diligence with respect to his August, 1992 investment decision. On appeal, Silmon has done nothing to suggest that these conclusions were erroneous.

I.

PETITIONER'S FAILURE TO ESTABLISH THE EXISTENCE OF A MATERIAL MISREPRESENTATION OR OMISSION CAUSING HIM INJURY.

The Petitioner disputes the district court's holding that the bank's alleged omission of its improved financial situation and its intention to reissue debentures do not constitute actionable material omissions. Silmon misrepresents the grant of summary judgment as based on the immateriality of the alleged omissions. The district court instead questioned the connection of those allegations to the source of Silmon's purported injury — the alleged "secret merger plan." Regardless of the abstract materiality of the alleged omissions, Silmon did not state a claim establishing the causal link between the alleged omissions and his alleged lost profits.

In order to establish a securities fraud claim under Section 10(b) and Rule 10b-5,[1] a plaintiff must allege and prove "(1) a misstatement or an omission (2) of a material fact (3) made with scienter (4) on which the plaintiff relied (5) that proximately caused the plaintiff's injury." *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 520 (5th Cir. 1993) (citation omitted). The plaintiff must show both "transaction causation" — that, but for the misrepresentation or omission, the plaintiff would not have acted to his detriment — and "loss causation" — that the violation proximately caused the plaintiff's injury. *Litton Industries, Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 967 F.2d 742 (2nd Cir. 1992). The district court granted summary judgment based on Silmon's failure to establish either transactions causation or loss causation.

Silmon regrets his choice to redeem the debentures for cash rather than stock because First Bancorp's later merger increased the value of its stock. This alleged injury, however, remains

1. 15 U.S.C. § 78j and 17 C.F.R. § 240.10b-5

entirely unconnected to the alleged material omissions at the time of the retirement of Silmon's debentures, years earlier. There exists no evidence to indicate that Silmon's redemption of the debentures for cash rather than stock had any influence on First Bancorp's decision to merge, therefore the question of the materiality of the omissions is moot.[2] Indeed, there can be no serious suggestion of a material omission. As noted by the district court, there is simply no evidence that First Bancorp intended to merge at the time it redeemed Silmon's debentures.

II.

PETITIONER'S LACK OF DUE DILIGENCE.

An additional basis for the granting of summary judgment was the petitioner's failure to exercise due diligence. The Fifth Circuit has stated that due diligence is a separate element of a plaintiff's 10b-5 action. *Trust Co. of Louisiana v. N.N.P., Inc.*, 104 F.3d 1478, 1490 (5th Cir. 1997).

The underlying court properly identified and relied on the standard of due diligence established by the Fifth Circuit. That standard being, "[a] Rule 10b-5 plaintiff may not intentionally refuse to investigate 'in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.' " *Haralson v. E.F. Hutton*, 919 F.2d 1014, 1031 (5th Cir. 1990) *citing Dupuy v. Dupuy*, 551 F.2d 1005, 1020 (5th Cir. 1977), *cert. denied*, 434 U.S. 911.

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2. The district court also found that First Bancorp did not omit to inform Silmon of its improvement in earnings. The evidence at summary judgment established that the bank sent its annual report to Silmon personally, and published its earnings in the local newspaper. Silmon cannot convert his failure to read the bank's financial statements into a material omission.

The underlying court considered all of the evidence regarding petitioner's 10b-5 claim and concluded:

> With this background, a reasonable juror could not conclude that Silmon acted with due diligence. If he had requested information from Bancorp and they failed to provide him with accurate information or misstated material facts, then Silmon might have a claim. But, this was not the case. Bancorp merely acted within its contractual rights to redeem the debentures. Silmon requested *no* information and made *no* inquiries as he was invited to do by the redemption letter (emphasis by the court). After almost ten years as a bank director, he knew the questions to ask and the persons who had the information.

When considering the due diligence of a 10b-5 plaintiff, it is not the court's function to throw "life rings" to plaintiff who are victims of their own poor business judgment. *Schlesinger v. Hertzog*, 2 F.2d 135, 141 (5th Cir. 1993). Petitioner's failure to take any action to investigate the appropriateness of the debenture conversion cannot be categorized as anything but lack of due diligence.

III.

THERE WAS NO PATTERN OF FRAUD PRACTICED AGAINST THE PETITIONER.

In the underlying action, petitioner presented a scattershot of allegations in an unsuccessful effort to establish a RICO claim against the respondents. Under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Plaintiff was repeatedly

granted leave to state a claim under RICO and just as repeatedly failed to do so. Here, the petitioner has narrowed his focus to an allegation of securities fraud which occurred when the respondents caused First Bancorp to purchase ESOP stock owned by former bank employees in 1992 and 1993.[3] Notably, Silmon was never a vested participant in the First Bancorp ESOP, and he had absolutely no connection to the employees' stock tender.

When considering a Rule 12(b)(6) motion on a RICO claim, the facts alleged in the complaint must be read in a light most favorable to the petitioner. *H. J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249 (1989). However, the Fifth Circuit and other circuits have stated that when making a RICO claim based on fraud, the plaintiff's pleadings must be made with the specificity required by Rule 9(b). *Old Time Enters. v. International Coffee, Inc.*, 862 F.2d 1213, 1217 (5th Cir. 1989); *Vild v. Visconti*, 956 F.2d 560 (6th Cir. 1992), *cert denied*, 506 U.S. 832; *Grave Mill Development Corp. v. Colonial Bank & Trust Co.*, 929 F.2d 988 (7th Cir. 1991); *Craighead v. E. F. Hutton*, 899 F.2d 485 (6th Cir. 1990); *Blake v. Dierdorft*, 856 F.2d 1365 (9th Cir. 1988); *New England Data Services, Inc. v. Becher*, 829 F.2d 286 (1st Cir. 1987).

The district court found that the allegations in the petitioner's complaint failed to provide sufficient detail regarding the time, place and contents of the alleged misrepresentations and omissions. In its Report and Recommendations, the underlying court specifically referred to the lack of factual specificity regarding the 1992 and 1993 ESOP purchases:

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3. Petitioner claims that the underlying court misinterpreted the requirements of 18 U.S.C. § 1344 when considering the repurchase of the ESOP stock by First Bancorp. However, the stock repurchase was an alleged act of securities fraud not bank fraud which is the subject of 18 U.S.C. § 1344. Thus, petitioner's argument regarding the underlying court's alleged misinterpretation is inconsequential.

> . . . there are vague allegations that the defendants should have known that the value of the stock was worth more than its purchase price, or that it would shortly increase in value. There are also allegations that the value of the stock was "suppressed" in an appraisal for the defendants . . . Plaintiff does not allege, however, any facts in support of his conclusions that the value of the stock actually was higher than the purchase price at the time of these transactions and that the value stated in the appraisal was inaccurate; nor does he allege any facts in support of his conclusion that the defendants had knowledge that the actual value of the stock was higher than the amount paid.

This excerpt from the Report and Recommendation shows that the court did view the allegations made by the petitioner in a light most favorable to him. Nevertheless, the petitioner failed to make the requisite factual demonstration required by Rule 9(b) when bringing a federal securities fraud claim. Thus, the granting of respondents' Rule 12(b)(6) motion on petitioner's RICO claim was proper.

At a minimum, Rule 9(b) requires allegations of the particulars of time, place and contents of the false representations, the identify of the person making the misrepresentation and what was obtained by the misrepresentation. *Shushary v. Allwaste, Inc.*, 992 F.2d 517, 521 (5th Cir. 1993) *citing Tel-Phonic Services, Inc. v. TBS International, Inc.*, 975 F.2d 1134 (5th Cir. 1992). Silmon was unable to provide this detail despite being granted repeated opportunities to do so.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari does not present an issue which warrants review by this Court. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

BRENT B. BARRIERE, T.A.
Counsel of Record
HARRY ROSENBERG
TANIA TETLOW
PHELPS DUNBAR, L.L.P.
Attorneys for Respondents
First Bancorp of Louisiana, Inc.
and Hibernia Corporation
400 Poydras Street
Texaco Center, 30th Floor
New Orleans, Louisiana 70130
(504) 566-1311